Supreme Court, U.S.
F I L E

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JOHN DOE,

Petitioner,

vs.

BERKELEY PUBLISHERS, d/b/a THE BERKELEY INDEPENDENT.

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does the First Amendment to the Constitution of the United States permit a newspaper to publish the name of a rape victim when the identity of the rape victim is obtained through an unofficial disclosure from a jail personnel insider?

2. May the state of South Carolina prohibit the publication of a rape victim's name when that name has not been publicly released as was the case in The Florida Star v. B.J.F.?

LIST OF PARTIES TO THE PROCEEDING

All the parties to the proceeding are set forth fully in the caption, except that the plaintiff is proceeding, as permitted by the lower court, in the fictitious name of John Doe to protect his privacy. The plaintiff's true identity is known to the defendant and is disclosed in the newspaper article that gives rise to this action.

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Section 16-3-730, S. C. Code, Ann. (Publishing name of victim of criminal sexual conduct unlawful).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOHN DOE

v.

BERKELEY PUBLISHERS, d/b/a

THE BERKELEY INDEPENDENT

On a Petition for Writ of Certiorari to the Supreme Court of the State of South Carolina

John Doe respectfully petitions for a Writ of Certiorari to review the Judgment of the Supreme Court of South Carolina

I. CITATIONS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

John Doe v. Berkeley Publishers d/b/a The Berkeley Independent, 329 S.C. 412, 496 S.E.2d 636 (1998). This opinion is attached as Appendix "B." On March 18, 1998, the Supreme Court of South Carolina issued an order denying the Petition for Rehearing. That order is attached as Appendix "A."

John Doe v. Berkeley Publishers d/b/a The Berkeley Independent, 322 S.C. 307, 471 S.E.2d 731 (Ct. App. 1996). This opinion is attached as Appendix "C."

John Doe v. Berkeley Publishers d/b/a The Berkeley Independent, order granting defendant's motion for directed verdict, November 7, 1994. This statement is attached as Appendix "D."

II. JURISDICTIONAL STATEMENT

The final opinion in this case was entered by the South Carolina Supreme Court on February 23, 1998, reversing the opinion of the South Carolina Court of Appeals, and is the highest South Carolina court in which Petitioner could obtain relief. The Supreme Court denied the Petitioner's application for rehearing on March 18, 1998.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. Amendment I, United States Constitution.

The Seventh Amendment provides: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of

trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Section 16-3-730, S. C. Code of Laws states in applicable part: Whoever publishes or causes to be published the name of any person upon whom the crime of criminal sexual conduct has been committed or alleged to have been committed in this State in any newspaper. . . shall be deemed guilty of a misdemeanor. . .

STATEMENT OF THE CASE

John Doe was falsely arrested in July 1992. While awaiting trial, John Doe was sexually assaulted by a fellow inmate. Word of a "beating" spread through the community, and the defendant's publisher received a tip that John Doe had been beaten. He called a jail insider, Colonel Meade, a Berkeley County Sheriff's Deputy, who confirmed that John Doe had been beaten and, in addition, Col. Meade disclosed that Doe had been sexually assaulted. On July 29, 1992, the publisher ran a front page story identifying John Doe (using his true name) as the victim of a

sexual assault.

The plaintiff filed a lawsuit alleging invasion of privacy and intentional infliction of mental distress. The case came on to be heard by Judge Markley Dennis and a jury on October 26, 1994. At the close of a portion of the plaintiff's case, Judge Dennis, relying on The Florida Star v. B.J.F., directed a verdict against the plaintiff.

The plaintiff timely appealed to the South Carolina Court of Appeals, which affirmed the directed verdict as to the plaintiff's cause of action for intentional infliction of mental distress but reversed and remanded the case for a trial on the issue of invasion of privacy (appendix "C").

The publisher then appealed to the Supreme Court of South Carolina, which reversed the Court of Appeals on the ground that the plaintiff's identity as a rape victim in a county jail is a matter of public significance as a matter of law (appendix "B").

After timely moving for a rehearing, which was denied by the South Carolna Supreme Court (appendix "A"), this petition for writ of certiorari followed.

The federal question involved in this

case was raised by the pleadings themselves. In answering the complaint, the defendant set up the First Amendment as a defense: "The information published by defendant in its July 29, 1992 issue concerning the plaintiff was truthful information lawfully obtained concerning a matter of public interest and significance, and, as such, is privileged under the common law and the First and Fourteenth Amendments to the United States Constitution" (Answer of Respondent).

REASONS FOR GRANTING THE WRIT

The appellant seeks a review of the opinion of the South Supreme Court, which overturned the opinion of the South Carolina Court of Appeals. The Supreme Court of South Carolina held that the identity of a rape victim is public information "as a matter of law." Doe v. Berkeley Publishers, 329 S.C. 412, 496 S.E.2d 636 (1998): "We hold that the commission of a violent crime between inmates of a county jail is a matter of public significance as a matter of law." This holding is in conspicuous variance with this Court's opinion in The Florida Star v. B.J.F., 491 U.S. 524, 105 L. Ed.2d 443, 109 S.Ct.

2603 (1989). The Court of Appeals held that whether Doe's identity was subject to publication is a question of fact to be determined by a jury. See Doe v. Berkeley Publishers, 322 S.C. 307, 471 S.E.2d 731 (Ct. App. 1996), which is precisely the holding in this Court's opinion in The Florida Star.

The trial court directed a verdict against the appellant, holding that the United States Supreme Court decision The Florida Star permits the appellee newspaper to publish the appellant's name as a matter of First Amendment right. Strangely, the state's highest appellate court is silent in construing The Florida Star v. B.J.F. even though the Supreme Court is expressly overruling this Court's holding. While the Court of Appeals discussed The Florida Star extensively, the Supreme Court never mentions the case even though the trial court dismissed the case based on its reading of The Florida Star. At the trial of the case, the trial judge announced:

> We also have decisions--the Aiken case cited, I believe, talks about rights of civil action, but with respect to the invasion of privacy our Court has recognized--you're correct that they've

> cited it [The Florida Star case] and Judge Harwell expanded on it but not without qualification, but the Court cannot ignore Florida Star versus BJF and the close similarities in that case.
>
> We're dealing with a rape victim and a statute prohibiting it and a suit brought, and clearly the public interests arguments have been raised and any number of arguments, but the Supreme Court of the United Sates has decided it in my opinion (appendix, "D").

Of course, the decision in The Florida Star predicted the appearance of the present case. Justice Marshall in writing the majority opinion cautioned that the opinion was a "discrete" one and that

> . . . although our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context. . . .Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have

> carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . Our holding today is limited. . . .We accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests as to satisfy the Daily Mail standard. The Florida Star at pages 530, 532, 537, and 541.

Just as Justice Marshall predicted, such a case has arisen. The facts are not in dispute. John Doe was falsely accused of a crime. While he was incarcerated prior to trial (there never was a trial; the Grand Jury refused to indict him), he was raped by a fellow inmate. The publisher of the local newspaper telephoned a jail insider, a Colonel in the Berkeley County Sheriff's Department, who disclosed John Doe's identity as a rape victim. The publisher then ran the story on his front page.

At the trial of the case, both parties

relied upon The Florida Star, the appellant for the proposition cited above, and the appellee cited the case for the proposition that the newspaper could publish the information. The factual distinction between The Florida Star and the present case is not a matter of dispute. In The Florida Star the newspaper acquired B.J.F.'s name by obtaining an incident report in the press room. In the present case, the newspaper obtained John Doe's name from a surreptitious telephone call. Thus this case turns on an analysis of whether disclosure of Doe's name by a jail insider in a phone call is the same type of public disclosure that permitted the publication of B.J.F.'s identity in The Florida Star. The appellant contends that such disclosure is clearly not a "public" disclosure, and that the discrete facts of this case make this case precisely the one anticipated by Justice Marshall in the opinion in The Florida Star.

Moreover, at the trial of the case, the plaintiff called a former sex crimes prosecutor as a witness. At trial, the appellant questioned this witness regarding the publisher's resistance to protecting rape victims' privacy, and she explained the

compelling state interest in such protection: "I remember discussing it [the statutory prohibition against publication of a rape victim's identity] and telling him [the publisher in the present case] that the whole point of the law is to encourage people to be able to report rape crimes, because if we don't have the cooperation of the victims of these crimes we cannot prosecute" (Appendix "E"). South Carolina, like most states, has a statute that prohibits the publication of a rape victim's name (Section 16-3-730, S.C. Code, Ann.).

The First Amendment does not permit a newspaper to publish John Doe's identity in this case, and this Court should grant certiorari to prevent The Florida Star from becoming what this Court has so carefully guarded against--authority to publish any thing under any circumstance. The Supreme Court of South Carolina in its opinion failed to consider and abide by the holding of this Court in The Florida Star v. B.J.F.. This Court should grant certiorari to correct the error of the state Supreme Court and insure that the decisions of this court are uniformly applied across the nation.

Respectfully submitted,

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(843) 554-4291
Attorneys for Petitioner

APPENDIX

APPENDIX "A"

THE SUPREME COURT OF SOUTH CAROLINA

March 18, 1998

Thomas R. Goldstein, Esquire
Belk, Cobb, Infinger & Goldstein
Post Office Box 71121
Charleston, South Carolina 29415-1121

Re: John Doe v. Berkeley Publishers, d/b/a The Berkeley Independent
Case No. 93-CP-08-0133

Dear Mr. Goldstein:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition for Rehearing is denied.

s/Ernest A. Finney, Jr. C.J.
s/Jean H. Toal A.J.
s/James E. Moore A.J.
s/John H. Waller,Jr. A.J.
s/E. C. Burnett, III A.J.

March 18, 1998."

Please be advised that the remittitur in this matter is today being forwarded to the Clerk of Court for Berkeley County.

Please be further advised that it will be necessary for you to make arrangements to retrieve Plaintiff's Exhibits 1 - 4 which were originally filed by you in this case. Due to their large size, it is not readily feasible to mail them to you. Kindly arrange to pick up the exhibits within ten (10) days of the date of this letter.

Very truly yours,

s/Clyde Davis, Jr.
CLERK

APPENDIX "A"

THE BERKELEY COURT OF APPEAL

March 18, 1994

Thomas R. Goldstein, Esquire
Beck, Cobb, Dellinger & Goldstein
Post Office Box 7121
Charleston, South Carolina 34417-7121

Re: John Doe v. Berkeley Publishers, et al.
The Berkeley Independent
Case No. 93-CP-08-0111

Dear Mr. Goldstein:

The Court has refused your Petition for Rehearing in the above-case in the following Order:

"Petition for rehearing is denied.

Alfred J. Tharp, Jr. J.
Alton B. Todd J.
Wilmer E. Moore A.J.
Alton H. Kelly, Jr. A.J.
Eli C. Bottcher, III A.J.

March 18, 1994."

Please be advised that the Remittitur in this matter is today being forwarded to the Clerk of Court for Berkeley County.

Please be further advised that it will be necessary for you to take affirmative to retrieve Plaintiff's Exhibits 1 - 4 which were originally filed by you in this case. Due to their large size, it is not readily feasible to mail them to you. Kindly arrange to pick up the exhibits within ten (10) days of the date of this letter.

Very truly yours,

s/Clyde Davis, C.J.
CLERK

APPENDIX "B"

THE STATE OF SOUTH CAROLINA
In the Supreme Court

John Doe, Respondent,

v.

Berkeley Publishers,
d/b/a The Berkeley
Independent, Petitioner.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Berkeley County
R. Markley Dennis, Jr., Judge

Opinion NO. 24765
Heard November 6, 1997 - Filed
February 23, 1998

REVERSED

FINNEY, C.J.: We granted certiorari to review that part of the Court of Appeals' opinion which reversed the trial court's order directing a verdict for petitioner on respondent's invasion of privacy claim. Doe v. Berkeley Publishers, d/b/a The Berkeley Independent, 322 S.C. 307, 471 S.E.2d 731 (Ct.App. 1996). We reverse the decision of the Court of Appeals.

Respondent's claim is based on the petitioner's truthful reporting that respondent was the victim of a sexual assault by an inmate while both were incarcerated at the Berkeley County jail.[1] The issue in an invasion of privacy claim is whether the occurrence is a matter of legitimate public or general interest. Meetze v. The Associated Press, 230 S.C 330, 95 S.E.2d 606 (1956). While ordinarily the issue whether an occurrence meets this test is a question of fact for the jury, under some circumstances it may be a question of law for the court. Compare Hawkins v. Multi-Media, 288 S.C. 569, 344 S.E.2d 145 (1986) (whether birth of a out-of-wedlock child was a matter of legitimate public or general interest was a jury question) with Meetze, supra (birth of child to twelve year old mother on year after her marriage was a matter of public interest as a matter of law). We hold that the commission of a violent crime between inmates of a county jail is a matter of public significance as a matter of law.

The Court of Appeals reversed the trial judge, holding that "whether publishing Doe's name as the victim of sexual assault was a matter of public significance" was an issue for the jury. Doe, 322 S.C. at 314, 471 S.E.2d at 735. We disagree. The Court of Appeals erred in separating the plaintiff's identity from the event. Under state law, if a person, whether willingly or not, becomes an actor in an event of public or general interest, "then the publication of his connection with such an occurrence is not an invasion of his right to privacy." Meetze,

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[1]A fuller description of the facts can be found in the Court of Appeals' decision.

230 S.C. at 337, 95 S.E.2d at 609. Accordingly, Doe's invasion of privacy claim fails as a matter of law, and the trial court's directed verdict was proper. The decision of the Court of Appeals is therefore

REVERSED.

Toal, A.J., Moore, Waller and Burnett, JJ., concur.

APPENDIX "C"

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Doe, ... Appellant,

v.

Berkeley Publishers, d/b/a The Berkeley Independent, ... Respondent.

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 2501
Heard January 11, 1996 - Filed April 22, 1996

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

PER CURIAM: John Doe appeals the trial judge's order granting a directed verdict to Berkeley Publishers, d/b/a The Berkeley Independent ("Berkeley") on Doe's claims of invasion of privacy and intentional infliction of emotional distress. We affirm the grant of the directed verdict on intentional infliction of emotional distress; we reverse the grant of

the directed verdict on intentional infliction of emotional distress; we reverse the grant of directed verdict on invasion of privacy, and remand for further proceedings consistent with this opinion.

I. Facts

On July 15, 1992, John Doe was arrested for allegedly dousing a St. Stephens woman with gasoline and setting fire to her mobile home. He was charged with assault and battery with intent to kill, kidnapping, first degree burglary, and first degree arson. On January 15, 1993, the Berkeley County Grand Jury returned each indictment with a designation of "NO BILL."

While Doe was being held at the Berkeley County jail on these charges, a woman, who identified herself as the sister of Doe's alleged victim, called Allen Morris, the editor and publisher of The Berkeley Independent, and told him Doe had been "beaten up" in jail. Morris then contacted the Berkeley County Sheriff's Department to confirm the information. He talked to Colonel Meade, who informed him the department had an incident report reflecting Doe had been sexually assaulted while incarcerated.

Morris told one of his reporters.

Subsequently, The Berkeley Independent published a story about Doe's arrest, as well as an articles disclosing Doe's identity as the victim of a rape by a fellow inmate while being held at the jail.

II. Procedure

Doe sued Berkeley for invasion of privacy and intentional infliction of emotional distress. He filed the summons and complaint as John Doe. The trial judge ordered him to proceed using his real name. Berkeley answered, alleging because the publication was truthful, lawfully obtained, and concerned a matter of public interest, it was privileged under the First and Fourteenth Amendments to the United States Constitution.

The trial judge bifurcated the issues of liability and damages. At the close of the liability portion of the case, he orally directed a verdict for the newspaper on both causes of action. He signed a form order and requested that Berkeley's lawyer prepare a formal order. Doe appealed the directed verdict prior to the filing of the formal order. After the formal order was filed, Doe filed a motion for reconsideration, which was denied. Doe then appealed that order. He moved to use the fictitious name "John Doe"

for his appeal. The Supreme Court granted his motion.

III. Analysis of Substantive Issues on Appeal

A. Invasion of Privacy

Doe asserts the trial judge erred in direction a verdict on invasion of privacy. He argues his identity was either (1) unlawfully obtained or (2) whether it was unlawfully obtained was a question of fact for the jury.

When considering a motion for a directed verdict, the trial judge must view the evidence and all its inferences in the light most favorable to the non-moving party. If the evidence is susceptible of more than one reasonable inference, the case must be submitted to the jury. Horry County v. Laychur, ___ S.C. ___, 434 S.E.2d 259 (1993).

In directing a verdict for Berkeley on the cause of action for invasion of privacy, the trial judge relied on the United States Supreme Court decision in The Florida Star v. B.J.F., 491 U.S. 524 (1989). In Florida Star, the Court adopted the following test, first enunciated in Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979):

> [I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials

may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.

1. Lawfully Obtained

Doe argues that because South Carolina's rape shield statute makes it unlawful to disclose a rape victim's name, the Sheriff's Department unlawfully disclosed the information and, correspondingly, Berkeley unlawfully received the information. See S.C. Code Ann. §16-3-730 (1985).[1] However, the rape shield statute is a criminal statute and does not govern whether the information was lawfully obtained. Dorman v. Aiken Communications Inc.,303 S.C. 63, 398 S,E.2d 687 (1990) (construing §16-3-730 as a criminal statute created primarily for the protection of the public, and holding it does not created

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[1] S. C. Code Ann. § 16-3-730 states in full:

> Whoever publishes or causes to be published the name of any person upon whom the crime of criminal sexual conduct has been committed or alleged to have been committed in this State in any newspaper, magazine or other publication shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years. The provisions of this section shall not apply to publications made by order of the court.

a private right of action). Rather, the South Carolina Freedom of Information Act governs this issue. S.C. Code Ann. §§30-4-10-110 (1991 and Supp. 1995). S. C. Code Ann. §30-4-50 declares certain matters "public information." Subsection (A) (8) includes "incident reports which disclose the nature, substance, and location of any crime or alleged crime reported as having been committed." Subsection (A) (8) also notes "[w]here an incident report contains information exempt as otherwise provided by law, the law enforcement agency may delete that information from the incident report." S. C. Code Ann. §30-4-50 (A) (8) (Supp. 1995) (emphasis added). Accordingly, the Sheriff's Department had discretion whether or not to delete John Doe's name from the incident report. Section 30-4-40 exempts certain matters from public disclosure, including "[i]nformation of a personal nature where public disclosure thereof would constitute unreasonable invasion of personal privacy." S.C. Code Ann. §30-4-40 (a) (2) (Supp.1995). Because the plain language of §30-40-50 contemplates the release of exempt information, the two code sections are not inconsistent and the Sheriff's Department

retained its discretion. **See Florida Star**, 491 U.S. at 536 ("the fact that, state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them when furnished by the government"); accord, South Carolina Tax Comm. v. Gaston Copper Recycling Corp., S.C. , 447 S.E.2d 843 (1994) (exemptions from FOIA impose no duty not to disclose but simply allow the public agency discretion to withhold exempted material from disclosure); **see also Mims v. Alston**, 312 S.C. 311, 440 S.E.2d 357 (specific statute controls over more general statute).

Doe also argues there is an inference the information was unlawfully obtained because the newspaper reporter picked up the incident report more than six months after the article was published. Information capable of being lawfully obtained does not become transformed with the passage of time into something unlawfully obtained. Accordingly, we find as matter of law that Berkeley lawfully obtained the information.

2. Truthfulness

It is undisputed Doe was sexually assaulted while incarcerated in the Berkeley County jail. Therefore truthfulness is not an

issue.

3. Public Significance

Doe argues the trial judge erred in granting a directed verdict because a question of fact exists whether the news article published in The Berkeley Independent concerned a matter of public significance. In **Florida Star**, the Supreme Court held a news article revealing the name of a victim of sexual assault contained a matter of public significance because "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities." **Florida Star**, 491 U.S. at 530. The factual dissimilarities between this case and **Florida Star** lead to the conclusion the jury should decide whether the article at issue here contained a matter of public significance.

To begin with, the plaintiff in **Florida Star** sued the newspaper for invasion of privacy based on the negligent violation of statute which made it unlawful for any person to print, publish, or broadcast the name of a victim of a sexual offense in any instrument of mass communication. 491 U.S. at 528. The

Court held imposing damages in those circumstances violated the First Amendment. The Court noted, in contrast to common law claims of invasion of privacy, the statutory scheme it was scrutinizing did not require case-by-case findings, nor did it require scienter of any kind. 491 U.S. at 539. Here Doe sued for invasion of privacy based on common law, which does require case-by-case findings.

Moreover, in **Florida Star** the article was one of 54 "police blotter" stories the newspaper ran that day. 491 U.S. at 527. Here, the articles was a sidebar to a larger article that appeared on the front page. The Florida Star alleged inclusion of the victim's name was inadvertent. Id. at 528. Under the facts presented here, it appears The Berkeley Independent did not inadvertently publish Doe's name. The editor for The Berkeley Independent testified the paper published the story to show "the irony that a person charged with a series of violent crimes had himself been the alleged victim of a violent crime." He furthermore stated deleting Doe's name from the article could have changed the story because "[Doe's] name was printed as an aspect, a valuable aspect, among many aspects

of the story." However he acknowledged the entire story could have been run simply deleting Doe's name. In fact, a report of the trial of serial rapist, in which the rape victim's name was not disclosed, ran in the same issue of the newspaper as the Doe article. Furthermore, the editor admitted The Berkeley Independent had never before published a rape victim's name. The editor characterized the two stories about Doe as "a matter of public interest and concern," because the newspaper reports crimes so people in the community can know what crimes have been committed. The editor distinguished printing Doe's name from not printing other rape victims' names because Doe was incarcerated and the other victims were not. In contrast, the reporter who wrote the article testified even though it was the paper's policy to delete the names of rape victims, this article presented a "a special circumstance" in that "[t]here was a crime committed and [Doe's name] was already listed in the story."

Issues of fact concerning Berkeley's purpose in including Doe's name bear on public significance because not every purpose will rise to the level of public significance. See

Hawkins v. Multimedia Inc., 288 S.C. 569, 344 S.E.2d 145 (whether a fact is a matter of public interest is a question of fact to be decided by the jury), cert. denied, 479 U.S. 1012 (1986);[2] cf. Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956) (one limitation on the right of privacy is that it does not prohibit the publication of matter which is of legitimate public or general interest; public interest is more than mere curiosity). Accordingly, we remand the issue of whether publishing Doe's name as a victim of sexual assault was a matter of public significance for a jury to determine.

B. Intentional Infliction of Emotional Distress

The trial judge directed a verdict in favor of Berkeley on Doe's intentional infliction of emotional distress cause of action, relying on Upchurch v. New York Times Co., ___S.C.___, 431 S.E.2d 558 (1993). In Upchurch, plaintiffs sued for intentional infliction of emotional distress based on an article that appeared in The Spartanburg Herald implicating cocaine use in the death of

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[2] Although this case pre-dated Florida Star, "legitimate public or general interest" may be analogized to "a matter of public significance."

their family member, Bodie Upchurch. An autopsy showed Upchurch died of an undiagnosed heart condition. The white, powdery substance found in Upchurch's nostrils was not cocaine and could have been chalk or talc used by Upchurch while weightlifting. In upholding the trial judge's grant of a directed verdict, the Supreme Court indicated that it was not necessary to address the threshold inquiry under Florida Star where there was no basis upon which to assert a cause of action for intentional infliction of emotional distress. Id. Doe did not appeal the trial judge's grant of a directed verdict based on Upchurch and thus, it became the law of the case. Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473, 427 S.E.2d 646 (1993) (an unchallenged ruling by the trial court is the law of the case). Accordingly, we affirm the trial judge on this issue.

IV. Analysis of Procedural Issues on Appeal

Doe next asserts the trial judge erred in signing a written order confirming his oral order granting Berkeley a directed verdict because the trial judge lost jurisdiction once Doe file a notice of appeal.

After orally directing a verdict for Berkeley, the trial judge asked counsel for

Berkeley to prepare a formal order. The form order entering judgment in the case, dated October 26, 1997, stated "[counsel for Berkeley] to prepare formal order." On November 4, 1994, John Doe's Notice of Intent to Appeal was filed. On November 7, 1994, the trial judge signed the formal order which was filed with the Clerk of Court's office on January 17, 1995. Although Rule 204, SCACR, provides that "[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal," Rule 203(b) (1), SCACR, governs the time for service of a notice of appeal from the Court of Common Pleas:

> When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order of judgment.

(Emphasis added.) Accordingly, the trial judge did not lose jurisdiction of the case.

Doe further alleges the written order contained matters not in the record as well as inferences that should have been drawn in favor of Doe as the non-moving party. Doe fails to provide argument or supporting

authority for this error. Thus, we assume he abandoned this issue. First Savings Bank v. McLean, ____S.C.____, 444 S.E.2d 513 (1994) (appellant was deemed to have abandoned issue when he failed to provide any argument or supporting authority).

Doe also argues the trial judge erred in denying his right to proceed under a fictitious name as a victim of a rape. However, the Supreme Court granted his motion to proceed under a fictitious name. Therefore, he may proceed under this name on remand.

Accordingly, the order of the trial judge is

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

HOWELL, C.J., CURETON AND CONNOR, JJ., CONCUR.

APPENDIX "D"

[Oral order on directed verdict]

MR. GOLDSTEIN: There is a statute that has been upheld as being constitutional prohibiting the disclosure of a rape victim's name. The statute has been violated. There are so many cases that stand for the proposition that violation of a statute is evidence of negligence per se that--I mean, that alone is evidence of recklessness.

So, I mean, I have made--I have met my test, my reasonable inference test.

THE COURT: Well, this is a question that I note in reviewing the file that summary judgment was made as being novel in the Court. Certainly that's the basis at that stage, and we're at the directed verdict stage.

There is no question that we have a statute that clearly--the rape shield statute, no question about it. Certainly we know the legislative intent behind it as well.

We also have decisions--the Aiken case cited, I believe, talks about right of civil action, but with respect to the invasion of privacy our Court has recognized--you're correct that they've cited it and Judge Harwell expanded on it but not without qualification, but the Court cannot ignore

Florida Star versus BJF and the close similarities in that case.

We're dealing with a rape victim and a statute prohibiting it and a suit brought, and clearly the public interests arguments have been raised and any number of arguments, but the Supreme Court of the United States has decided it in my opinion.

That's what I am called upon, and that's what I have elected to do. It's a tough job.

It's what they elected me to do, to hear the law and apply it. Given that application, given the Meetz case, I would grant Defendant's motion for direction of verdict in that cause of action.

As to the second cause of action, intentional infliction of emotion distress--maybe it's the first cause of action--I think clearly the Upchurch case, together with the other cases cited, establish a foundation for the intentional infliction of emotional distress.

As to that cause of action, intentional infliction of emotion distress--maybe it's the first cause of action--I think clearly the Upchurch case, together with the other cases cited, establish a foundation for the intentional infliction of emotional distress.

As to that cause of action, based on the facts of this case, the direction of verdict is almost mandated, and, therefore, I grant the Defendant's motion for direction of verdict as to both causes of action.

MR. BENDER: Thank you, Your Honor. Would you like me to prepare the Order?

THE COURT: Yes. So that it is clearly and succinctly stated. (Whereupon, jury was excused by the Court)

[TESTIMONY OF BARBARA DUPREE]

I remember on three occasions telling him distinctly that it's not the law, and explaining to him what the law is that he cannot do this at all.

MR. BENDER: Objection, Your Honor, to this witness'
statement about what the law is. I think that is exclusively your province.

A. Thank you. I just distinctly remember tell him on three occasions that it wasn't and he wanted to continue arguing with me, at which time I discontinued the conversation and walked away.

Q. Did you admonish Mr. Morris about publishing the names of rape victims?

A. I remember discussing it and telling him that the whole point of the law is to encourage people to be able to report rape crimes, because if we don't have the cooperation of the victims of these crimes we cannot prosecute.

If that child or that person does not testify you do not have a case.

Q. Now, I put up there for you to look at some documents that have been marked as Plaintiff's Exhibits 5, 6, 7,and 8. I hope I got the numbers right.

A. Yes.

Q. Do you know--can you identify those documents as to what they are?

Supreme Court, U.S.
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No. 98-325

In The

Supreme Court of the United States

October Term, 1997

JOHN DOE,

Petitioner,

vs.

BERKELEY PUBLISHERS, d/b/a
THE BERKELEY INDEPENDENT,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of South Carolina**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment to the Constitution of the United States permit a newspaper to publish the name of a rape victim when the identity of the rape victim is obtained through an unofficial disclosure from a jail personnel insider?

2. May the State of South Carolina prohibit the publication of a rape victim's name when that name has not been publicly released as was the case in *The Florida Star v. B.J.F.*?

LIST OF PARTIES AND RULE 29.6 LIST

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this Respondent's Brief in Opposition, except that respondent's correct corporate name is Berkeley Publishers, Inc., and, as stated in the Petition for Writ of Certiorari, the petitioner is proceeding in the fictitious name of John Doe. The petitioner's name is known to the parties and is disclosed in the newspaper article upon which the action is based.

The respondent is a South Carolina corporation. It has no parent company and it has no subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Berkeley Publishers, d/b/a The Berkeley Independent, respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioner, John Doe.

CITATIONS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

The Opinion of the Supreme Court of South Carolina sought to be reviewed by the petitioner herein is reported at 329 S.C. 412, 496 S.E.2d 636 (1998), and is printed as Appendix "B" to the petitioner's petition for a writ of certiorari. The Order of the Supreme Court of South Carolina refusing rehearing is unreported and is printed as Appendix "A" to said petition.

The Opinion of the South Carolina Court of Appeals is reported at 322 S.C. 307, 471 S.E.2d 731 (Ct.App. 1996), and is printed as Appendix "C" to said petition.

The bench ruling of the trial judge granting respondent's motion for directed verdict is not reported and the transcript thereof is printed as Appendix "D" to said petition. The formal written Order of the trial judge granting respondent's motion for directed verdict is not reported and is printed in the Appendix to this brief in opposition at p. 1a, *infra*. The Order of the trial judge denying petitioner's motion for reconsideration is not reported and is printed in the Appendix to this brief in opposition at p. 2a, *infra*.

JURISDICTION

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257. Respondent questions the Supreme Court's jurisdiction at I, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. I

The text of this provision is reproduced in the petition at p. 3.

U.S. CONST. amend. VII

The text of this provision is reproduced in the petition at pp. 3-4.

U.S. CONST. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

S.C. CODE ANN. § 16-3-730 (1976)

The applicable part of the text of this provision is reproduced in the petition at p. 4.

S.C. CODE ANN. § 30-4-50(8) (1991)
[§ 30-4-50(A)(8) as amended by 1992
Act No. 269, § 1, effective February 24, 1992]

> Without limiting the meaning of other sections of this chapter, the following categories of information are specifically made public information subject to the restrictions and limitations of §§ 30-4-20, 30-4-40 and 30-4-70 of this chapter:
>
> * * *
>
> (8) Incident reports which disclose the nature, substance, and location of any crime or alleged crime reported as having been committed. Where an incident report contains information exempt as otherwise provided by law, the law enforcement agency may delete that information from the incident report.

STATEMENT OF THE CASE

On July 15, 1992, petitioner was arrested and charged with several serious crimes. The Berkeley County Grand Jury ultimately returned each of the indictments against petitioner for the alleged crimes with a designation of "No Bill." (R.pp. 113-120).[1] Prior to that disposition by the grand jury and while petitioner was being held in the Berkeley County Jail on the charges, petitioner was raped by another inmate.

---

[1] References to the Record on Appeal before the South Carolina Court of Appeals and the Supreme Court of South Carolina are designated herein by the letter "R."

While petitioner was being held in the jail, a woman who identified herself as being related to the victim of the crimes allegedly committed by petitioner (R.p. 50, lines 11-22) called Allen Morris, the editor and publisher of the respondent's newspaper, *The Berkeley Independent*, and told him that petitioner had been "physically attacked" or "beaten up" in jail (R.p. 54, lines 14-19). Mr. Morris then called the Berkeley County Sheriff's office to confirm that information (R.p. 54, lines 14-22). He talked with Colonel Meade of the Berkeley County Sheriff's Department and Colonel Meade told him that petitioner was the victim of a sexual assault in the jail (R.p. 54, lines 14-22; p. 65, lines 10-20; p. 67, line 20-p. 68, line 4) and that there was an incident report reflecting that information (R.p. 55, lines 4-14; p. 67, line 20-p. 68, line 4).

Mr. Morris gave the information to his reporter who was working on a story about petitioner's arrest and, on July 29, 1992, respondent published an article in *The Berkeley Independent* in conjunction with and as a sidebar to the story reporting petitioner's arrest disclosing petitioner's identity (using his true name) as the victim of a rape by a fellow inmate while being held at the Berkeley County Jail. The article recounted the report of the offense, the results of a sexual assault examination performed on petitioner, and the arrest of a named suspect, who was charged with criminal sexual conduct, first degree, and placed under a $100,000 surety bond.

Petitioner thereafter instituted this action in the Court of Common Pleas for Berkeley County, South Carolina, and by his Amended Complaint in the action sought recovery of damages on an alleged cause of action for invasion of privacy and an alleged cause of action for

intentional infliction of emotional distress based upon the respondent's publication of the aforesaid article.

Petitioner's Answer to the Amended Complaint set forth qualified general denials to each of the causes of action, admitting the publication and content of the article concerned but denying the other material allegations of the Amended Complaint, except for allegations of residence of the parties and respondent's status as publisher of *The Berkeley Independent*. In addition, the Answer alleged that the information concerning petitioner was truthful information lawfully obtained concerning a matter of public interest and significance, and, as such, was privileged under the common law and the First and Fourteenth Amendments to the United States Constitution.

Trial of the case was bifurcated as to the issues of liability and damages and the issue of liability was tried before the Honorable R. Markley Dennis, Jr., and a jury on October 26, 1994. At the trial, there was testimony as to the circumstances regarding the publication of the article concerned as referred to above. Mr. Morris testified that the stories that identified petitioner as having been arrested and as having been raped at the Berkeley County Jail were reported because they were news (R.p. 68, lines 5-18). Mr. Morris further testified that he did not know of petitioner's name as the victim of a sexual assault in jail until Colonel Meade told him (R.p. 65, lines 17-20). There was also evidence that at some time over six months after publication of the article, an employee of respondent obtained from the Sheriff's Department a copy of the Sheriff's Department incident report that identified petitioner as the person who was said to have

been raped at the Berkeley County Jail. (R.p. 83, line 6-p. 84, line 9; p. 88, lines 2-10).

At the close of petitioner's case on the issue of liability, the trial judge orally granted a motion by respondent for directed verdict as to both causes of action and instructed counsel for respondent to prepare a formal order (Pet. App. "D"). Petitioner appealed the directed verdict prior to the filing of the formal order. On January 17, 1995, the trial judge filed his formal written Order for Directed Verdict (Resp. App. 2a). By Order dated March 15, 1995, the trial judge denied a motion by petitioner for reconsideration (Resp. App. 1a) and petitioner appealed that Order.

The appeal was assigned to the South Carolina Court of Appeals and was heard on January 11, 1996. The Court of Appeals affirmed the grant of a directed verdict on the cause of action for intentional infliction of emotional distress. However, because it concluded that the jury should decide whether publishing petitioner's name as a victim of sexual assault was a matter of public significance, the Court of Appeals reversed the grant of a directed verdict as to the cause of action for invasion of privacy and remanded the case for further proceedings consistent with its Opinion. (Pet. App. "C"). The Supreme Court of South Carolina granted respondent's petition for a writ of certiorari to review the decision of the Court of Appeals to the extent the said decision reversed the judgment of the trial court granting a directed verdict on the cause of action for invasion of privacy and remanding the case for further proceedings. The Supreme Court of South Carolina thereafter reversed the decision of the Court of

Appeals, holding that under state law, petitioner's invasion of privacy claim failed as a matter of law. (Pet. App. "B"). Petitioner's petition for rehearing of the decision was refused. (Pet. App. "A").

REASONS FOR DENYING THE WRIT

I. The Supreme Court Has No Jurisdiction To Review This Case

No federal question was determined by the decision of the Supreme Court of South Carolina reversing the decision of the Court of Appeals in this case so as to provide a jurisdictional basis for this Court's review. As pointed out in *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986), this Court "has no authority to review state determinations of purely state law." Moreover, it is well settled that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, this Court's jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

It is apparent from the language of the Opinion of the Supreme Court of South Carolina in this case that the Court's decision is based entirely on South Carolina common law invasion of privacy principles as enunciated and applied in *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956). The Opinion points out that under the *Meetze* case, "[t]he issue in an invasion of privacy claim is whether the occurrence is a matter of legitimate public or

general interest." (Pet. App. "B"). In the Opinion, the Court held that the commission of a violent crime between inmates of a county jail is a matter of public significance as a matter of law without reference to or consideration of any constitutional issue. The Court held that "[t]he Court of Appeals erred in separating the plaintiff's identity from the event." (Pet. App. "B"). The Court went on to expressly hold:

> . . . *Under state law,* if a person, whether willingly or not, becomes an actor in an event of public or private interest, "then the publication of his connection with such occurrence is not an invasion of his right of privacy." *Meetze,* 230 S.C. at 337, 95 S.E.2d at 609. *Accordingly,* Doe's invasion of privacy claim fails as a matter of law, and the trial court's directed verdict was proper.

(Pet. App. "B"). (Emphasis supplied).

Furthermore, even if it is considered that the decision of the Supreme Court of South Carolina is contrary to that of the Court of Appeals with respect to the First Amendment issue discussed by the Court of Appeals, it is apparent that the Supreme Court of South Carolina decision is based on an independent and adequate state ground. The *Meetze* case predated this Court's decision in *The Florida Star v. B.J.F.,* 491 U.S. 524 (1989), by over thirty years and was not analyzed or decided on federal constitutional grounds. The *Meetze* case represents settled South Carolina common law and, contrary to petitioner's assertion that at the trial respondent "relied" on *The*

Florida Star (Petition, pp. 9-10), the *Meetze* case was submitted by respondent as an independent basis for granting respondent's motion for directed verdict on the invasion of privacy claim (R.p. 80, line 18-p. 82, line 12) and the trial judge's oral order granting the motion at trial was made not only with consideration of *The Florida Star* but also "given the Meetz [sic] case." (Pet. App. "D"). In his written Order for Directed Verdict, the trial judge held as one of the grounds for the decision granting respondent's motion that the petitioner was "not entitled to a recovery under South Carolina common law invasion of privacy principles" (Resp. App. p. 6a), citing the *Meetze* case for the principle that "when one, willingly or not, becomes an actor in an occurrence of public or general interest, he has no claim for invasion of privacy for publications connected with such occurrence." (Resp. App. p. 6a). The Opinion of the Supreme Court of South Carolina in the instant case makes it clear that the same state common law ground applied in the *Meetze* case was dispositive in the instant case.

II. The Questions Presented For Review In The Petition Are Not In Fact Raised By The Decision Below Or By The Record

The Questions Presented for Review by the petitioner are both framed as issues under the First Amendment to the Constitution of the United States. However, as discussed hereinabove, the decision of the Supreme Court of South Carolina from which review is sought is a decision based solely on state common law and does not present any First Amendment question for review by this Court.

Furthermore, the factual premises for the petitioner's Questions Presented for Review are not supported by the record. Petitioner's first Question Presented for Review is grounded in the assumption that the identity of the rape victim in this case was obtained through an "unofficial disclosure" from a jail personnel insider. Petitioner presents no basis for characterizing as an "unofficial disclosure" the response made by a Sheriff's Deputy to a request for information on a call made by news personnel. Similarly, there is no basis for the factual predicate of the second Question Presented for Review that the rape victim's name was not "publicly" released. There was no evidence of any restriction made by the Sheriff's Deputy on publication of the information which he supplied. The unrestricted release of information to the press is obviously the equivalent of public release. Moreover, the evidence showed that respondent's editor was told by the Sheriff's Deputy prior to publication of the news article that an incident report existed reflecting that petitioner had been raped at the Berkeley County Jail. (R.p. 54, line 3-p. 55, line 14; p. 67, line 20-p. 68, line 4). The evidence also showed that the incident report was subsequently obtained from the sheriff's office. (R. p. 83, line 6-p. 84, line 9; p. 88, lines 1-10). An incident report which discusses the nature, substance and location of any crime or alleged crime reported as having been committed is specifically made "public information" under the terms of the Freedom of Information Act in effect at the time concerned. S.C. CODE ANN. § 30-4-50(8) (1991) [§ 30-4-50(A)(8) as amended by 1992 Act No. 269, § 1, effective February 24, 1992]. It is thus apparent that the circumstances of the present case are not reflected in the Questions Presented

for Review by petitioner and that resolution of the Questions Presented for Review as stated by petitioner would result only in an impermissible advisory opinion.

III. In Addition To The State Law Ground For The Decision Of The Court Below, The Evidence Establishes That The Cause Of Action For Invasion Of Privacy Was Barred As A Matter Of Law By The Decision Of The Supreme Court Of The United States In *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989)

Even if the applicability of the free press guarantee of the First Amendment to the United States Constitution is considered as an issue for review by this Court, the evidence establishes that the cause of action for invasion of privacy is barred by the decision of this Court in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

An issue of whether imposition of damages against respondent on the cause of action for invasion of privacy is inconsistent with the constitutional protection of the First Amendment would have to be decided under the test first enunciated in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979), and adopted in *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989), as follows:

> . . . [I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order. . . .

There is no dispute in this case that the information that petitioner was the victim of a sexual assault was lawfully obtained and there is no issue as to the truthfulness of the information. In addition, under the standard established by *The Florida Star*, petitioner's identity as the victim of a sexual assault was clearly a matter of public significance.

As in the instant case, the news article concerned in *The Florida Star* involved a news report of a sexual assault that identified the name of the victim. The victim sought recovery of damages for the publishing of her name and the defendant newspaper invoked the constitutional protection of the First Amendment. Under the approach followed by the Supreme Court in *The Florida Star* for determining whether the article concerned a matter of public significance for the purpose of resolving the constitutional issue, the plaintiff's identity as the victim of a sexual assault was a matter of public significance because it was regarded as included in the public significance of the general subject of the article. In holding that the element of public significance was met in *The Florida Star*, the Supreme court expressly focused upon the subject matter of the article "generally" as the controlling factor, "as opposed to the specific identity contained within it. . . . " The Court held (491 U.S. at 536):

> . . . It is, clear, furthermore, that the news article concerned "a matter of public significance," 443 U.S., at 103, 99 S.Ct., at 2671, in the sense in which the *Daily Mail* synthesis of prior cases used that term. That is, the article generally, as opposed to specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent

> crime which had been reported to authorities. . . .

The news article in the instant case thus clearly concerns a matter of public significance as a matter of law under the test established in *The Florida Star* for the purpose of determining the constitutional issue of the applicability of the free press guarantee. The evidence in the instant case fits squarely within the decision in *The Florida Star*. As in *The Florida Star*, the article in the instant case "generally" involved "the commission, and investigation, of a violent crime which had been reported to authorities." No evidence or circumstance creates any issue with respect to that fact.

It is apparent from the analysis in *The Florida Star* that imposition of liability for damages on petitioner's cause of action for invasion of privacy would not serve "a need to further a state interest of the highest order" (491 U.S. at 537) as "narrowly tailored" (491 U.S. at 541) to such an interest so as to be outside the scope of the constitutional protection of the free press guarantee. It is undisputed that in the instant case a representative of the Berkeley County Sheriff's Department gave respondent the information that petitioner was the victim of a sexual assault. Similarly, a sheriff's department was the source of the information identifying the plaintiff in *The Florida Star* as the victim of a sexual assault. As one of three "independent reasons" (491 U.S. at 537) for finding the imposition of liability for damages "too precipitous a means" (491 U.S. at 537) of advancing the asserted state interests to satisfy the "need" required by the constitutional standard for imposing such liability, the Supreme

Court in *The Florida Star* pointed to the manner in which the information was obtained, saying (491 U.S. at 538):

> . . . [W]here the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize far more limited means of guarding against dissemination than the extreme step of punishing truthful speech. . . . Where, as here, the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting, Oklahoma Publishing* and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity. See *supra*, at 2609. Once the government has placed such information in the public domain, "reliance must rest upon the judgment of those who decide what to publish or broadcast," *Cox Broadcasting*, 42 U.S., at 496, 95 S.Ct., at 1047, and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence.

The undisputed facts shown by petitioner's evidence established that the cause of action for invasion of privacy was barred as a matter of law by the decision of the Supreme Court of the United States in *The Florida Star*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 22, 1998

APPENDIX

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

[John Doe],

Plaintiff,

vs.

Berkeley Publishers, d/b/a The Berkeley Independent,

Defendant.

IN THE COURT OF COMMON PLEAS

C. A. No. 93-CP-08-133

ORDER DENYING MOTION FOR RECONSIDERATION

This matter came before the court on motion of the plaintiff pursuant to Rule 59(e) *SCRCP*. Plaintiff's motion was premised on his position that the court lacked jurisdiction to enter a written order for a directed verdict and that the written order did not reflect the bench ruling for a directed verdict in favor of the defendant.

A hearing was held by telephone on March 10, 1995, with attorneys for the parties participating.

Based on the argument of counsel, plaintiff's motion is hereby denied.

AND IT IS SO ORDERED.

/s/
R. MARKLEY DENNIS, JR.
CIRCUIT JUDGE

Moncks Corner, South Carolina
March 15, 1995

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

[John Doe],

Plaintiff,

vs.

Berkeley Publishers, d/b/a The Berkeley Independent,

Defendant.

IN THE COURT OF COMMON PLEAS

C. A. No. 93-CP-08-133

ORDER FOR DIRECTED VERDICT

The July 29, 1992 edition of the *Berkeley Independent* newspaper contained two news stories that mentioned [John Doe], the plaintiff in the within action. The first story reported that [Doe] and another had been arrested and jailed for tying up a St. Stephen woman, dousing her with gasoline and setting her mobile home on fire. The second story reported that while [Doe] was being held in Berkeley County jail on those charges, he was raped by a fellow inmate. [Doe] filed suit against the owner of the newspaper claiming an invasion of privacy for publishing his name in the rape story. [Doe's] complaint was amended to add a second cause of action for intentional infliction of emotional distress.

The matter came on for trial on October 26, 1994. The court proposed, and the parties did not object to, a bifurcation of the trial to allow the liability issues to be considered prior to presentation of damages testimony. The bifurcation of the trial seemed appropriate as plaintiff's pre-trial brief indicated that there were no disputed issues of fact with regard to liability. Additionally, the

bifurcation would have the benefit of sparing [Doe] the expense of a medical expert on the damages issues in the event the liability question was resolved in favor of defendant.

[Doe] called the publisher of the newspaper who testified that the newspaper was preparing a story on [Doe's] arrest when he received a call from a woman who stated the she had heard that [Doe] had been "beaten up" while in jail. Seeking confirmation of this information, the publisher called the Berkeley County Sheriff's Department and talked with Col. James Meade. Col. Meade advised the publisher that [Doe] had not been "beaten up," but that he had been sexually assaulted by another inmate.

The publisher testified that a police incident report identifying [Doe] as the victim of a sexual assault was prepared by the Berkeley County Sheriff's Department. [Doe] also called Mary Bailey, a former reporter and editor for the *Berkeley Independent* who testified that when she obtained a copy of the incident report months after the sexual assault of [Doe], [Doe's] name was contained in the incident report identifying him as the victim of a sexual assault in the jail.

The publisher of the paper testified that the two news stories identifying [Doe] were consistent with the paper's publication of news relating to the commission of crime in the community. The publisher testified that the story identifying [Doe] as a rape victim also raised issues concerning the performance of public officials in the operation of the jail and the safekeeping of prisoners. Asked why [Doe] was named in the story, the publisher testified

that [Doe's] identity was already being disclosed in the story reporting on his arrest, and the identity was a part of the news reported in the rape story. Asked if the paper published the identity of other rape victims, the publisher replied that he did not recall another instance where the sexual assault had occurred on a person who was in the custody of the county accused of violent crimes.

Asked if the identification of [Doe] in the story was designed to increase paper sales or circulation, the publisher testified that [Doe's] name was used because it was news. Asked if the publisher had considered the effect of the publication on [Doe], the publisher testified that he did not know [Doe] and had not thought about how [Doe] might feel about the story.

At the close of plaintiff's evidence, defendant moved for a directed verdict. On the issue of the invasion of privacy claim, defendant argued that the United States Supreme Court decision in *Florida Star v. BJF*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.E.2d 433 (1989) and the decision of the Supreme Court of South Carolina in *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956) compelled the direction of a verdict.

In *Florida Star*, the United States Supreme Court reversed an award of damages to a rape victim whose name had been published in a newspaper after the name had been disclosed to the public and press by the inadvertent release of a police incident report. The court held that imposing damages on a newspaper for publishing the name of a rape victim which had been obtained from publicly released police documents was inconsistent with the First Amendment to the United States Constitution.

The *Florida Star* decision has been distilled to a three-part test which precludes the imposition of liability when a newspaper publishes information that has been lawfully obtained, that is truthful and about a matter of public significance. *Upchurch v. New York Times Co.*, ___ S.C. ___, 431 S.E.2d 558 (1993).

Here there was no dispute that the information published by defendant was truthful or that it was obtained from a law enforcement official. As to the question of public significance, the testimony of the publisher established that reports of violent crime are designed to inform the community of criminal conduct and efforts to control it. While the undisputed testimony of the publisher indicates that news stories regarding criminal activity are published because they are matters of public interest and significance, the question of public significance seems to be one of law under the *Florida Star* decision. Under that authority, the news article, generally, as opposed to the specific identify of the plaintiff contained within the article, involved a matter of "paramount public import: the commission, and investigation of a violent crime which had been reported to authorities." *Florida Star, supra*, 109 S.Ct. 2603 at 2611. In other words, the public significance is measured by the subject matter of the article not the identify of the plaintiff contained in the story.

Plaintiff argued that *S.C. Code Ann.* §16-3-730 (1976) which prohibits the publication of a sexual assault victim's name indicates a legislative choice to shelter the identity of rape victims from public awareness. While that may have been the intention of the legislature, it must be noted that a similar statute was advanced in the *Florida Star* case as the basis for defendant's liability, and

that argument was rejected on First Amendment considerations. Further, the Supreme Court of South Carolina held in *Dorman v. Aiken Communications*, 303 S.C. 63, 398 S.E.2d 687 (1990) that §16-3-730 does not provide a basis for civil liability through private causes of action claiming violations of the statute.

Plaintiff argues that the case before the court is not a "constitutional" case, but one involving a common law claim of invasion of privacy. This argument ignores the inherent tension between the right of privacy and the right of the press and the interest of the public in having a free dissemination of news and information. *Meetze, supra*. But, even if plaintiff's argument were persuasive, he is still not entitled to a recovery under South Carolina common law invasion of privacy principles. As the Supreme Court of South Carolina held in *Meetze, supra*, when one, willingly or not, becomes an actor in an occurrence of public or general interest, he has no claim for invasion of privacy for publications connected with such occurrence. And, where the details of the occurrence are required by law to be reported in a public record, no claim can be made for invasion of privacy. Plaintiff argues that the paper's delay in obtaining the police incident report which contained details of plaintiff's sexual assault, including his name, precludes the public record from being used as a shield against an invasion of privacy claim. This argument is inconsistent with *Meetze* where the public record was not obtained by the defendant prior to publication because the public record, a birth certificate, was not created until several weeks after publication of the story giving rise to the invasion of

privacy claim. The record in the present case is an incident report which under South Carolina law is to disclose information regarding crimes reported as having been committed and which is specifically a matter of public information under *S.C. Code Ann.* §304-50(8) (1976). While it might be argued that the identity of a rape victim could have been withheld by the Sheriff's Department, there was no obligation on the part of the Sheriff's Department to withhold the name from the public or delete it from the incident report. *S.C. Tax Comm. v. Gaston Copper Recycling Corp.*, 17 Davis Adv.Sh.Op.No. 24124 (7/18/94); *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219 (1991).

The intentional infliction of emotional distress claim was recognized in South Carolina in *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981). The elements of the cause of action identified in *Ford* require the plaintiff to prove that the defendant intentionally or recklessly inflicted severe emotional distress or was certain that such distress would follow from his conduct that the conduct was so extreme and outrageous as to exceed all possible of decency, that the actions of the defendant caused the plaintiff's emotional distress and the distress suffered by the plaintiff was so severe that no reasonable man could be expected to endure it. In considering a motion for a directed verdict, it is for the court to determine whether defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit a recovery on this theory, and only where reasonable persons may differ is the issue one for presentation to the jury. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 321 S.E.2d 602 (Ct.App.1984), rev'd on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985). This consideration is to be made in the

context of the limited nature of the "outrage" tort which is not a replacement for existing torts, but a theory of recovery where the historical torts fail to provide relief. F.P. Hubbard & R.L. Felix, *South Carolina Law of Torts* (1990) at p. 346.

In *Todd*, the Court of Appeals noted that three factors are usually present to support a claim. First, there is a pre-existing relationship between the parties, *e.g.*, debtor-creditor, insurer-insured. Second, the defendant's conduct arises in the exercise of excessive self-help in asserting a legal right or avoiding a legal obligation flowing from the pre-existing legal relationship. Third, the evidence shows clearly that the defendant calculatedly inflicted suffering or heedlessly and contemptuously disregarded the plaintiff's emotional suffering. *Todd, supra*, 321 S.E.2d at 610.

In the case before the court, there was no pre-existing legal relationship between plaintiff and defendant, there was no use of self-help in asserting some right or avoiding an obligation arising out of the relationship and no testimony to establish that defendant's conduct was directed at the plaintiff. As the Supreme Court of South Carolina held in upholding a directed verdict in favor of a newspaper on a claim arising out of the publication of a news story, even conduct that is intentional and outrageous cannot provide the basis for an intentional infliction of emotional distress claim unless it is conduct directed at the plaintiff or occurring in the presence of a plaintiff of whom the defendant is aware. *Upchurch, supra*. Likewise, as discussed fully above, and as the Supreme Court of South Carolina held in *Upchurch, Florida Star* precludes the imposition of liability where a

newspaper publishes truthful information lawfully obtained about a matter of public significance.

Based on the foregoing discussion, it is clear that plaintiff lacks any evidence to support any element of his claims for invasion of privacy or intentional infliction of emotional distress. Viewing the evidence and all inferences which may reasonably be drawn from the evidence in the light most favorable to the plaintiff, it appears that defendant's motion for directed verdict should be granted.

AND IT IS SO ORDERED.

/s/
R. MARKLEY DENNIS, JR.
CIRCUIT JUDGE

Moncks Corner, South Carolina
November 7, 1994